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NOV 22 1983
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CLERK

No. 83-553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD ARNOLD, IV and FRANCIS C. MIHALEK,
Petitioners,

v.

EASTERN AIR LINES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR EASTERN AIR LINES, INC.

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November 22, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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1. As a matter of fairness to Senator Ervin and Judge Ervin, respondent files this supplemental brief to make clear that no attempt was made in this case to influence the composition of the *en banc* court. In that regard, even petitioners disavow any intention of "directly attributing any improper motive or unethical conduct to anyone involved in the scenario" they describe. Pet. Supp. 3.

Senator Ervin is highly respected among North Carolina lawyers as an able advocate. Prior to his years of

service in the United States Senate, he served as both a trial and appellate judge in North Carolina, being an associate justice of the North Carolina Supreme Court from 1948 to 1954. After his retirement from the United States Senate in 1975, he returned to the private practice of law in Morganton, North Carolina, where he still practices today.

In the instant case Eastern was represented on appeal by the firm of Womble, Carlyle, Sandridge & Rice. Since approximately 1923 there has been a close professional relationship between Senator Ervin and the Womble, Carlyle firm during those periods when the Senator has been engaged in private practice. The earliest recollection of this relationship, among those who are still alive, dates back to the 1920s when the Senator and his father frequently consulted with senior partners of Womble, Carlyle on legal matters. Since 1975, when the Senator resumed private practice, he has been associated with Womble, Carlyle in major legal matters. One of these matters was being briefed by Senator Ervin and Womble, Carlyle to the Supreme Court of North Carolina in September 1980 when the Senator was asked by Womble, Carlyle to review its draft of appellant's initial brief to the Fourth Circuit in this case. The firm requested Senator Ervin to make this review because of his unique experience and ability as an advocate. He concluded his participation in the case in November 1980.

Commencing in March 1981 all parties filed their briefs in the court of appeals; on June 2, 1981, the case was argued to a three-judge panel (Bryan, Phillips and Murnaghan, JJ.); and the panel decided the case on June 4, 1982. In light of the panel's opinion and especially the dissenting opinion of Judge Murnaghan, Eastern filed a suggestion for rehearing *en banc* on June 16, 1982, and Circuit Judge Ervin abstained from voting on the suggestion.

In 1980, at the beginning of the appellate process, no lawyer could have reasonably foreseen how Judge Ervin's recusal could bear on the ultimate outcome of this case in the court of appeals. That would have required counsel to hypothesize that the panel, which was then unknown, would rule against Eastern; that the panel's opinions would provide a sound basis for a suggestion for rehearing *en banc*; that the vote on the suggestion for rehearing would be close; that Judge Ervin, faced with the hypothesized opinion and the hypothesized suggestion for rehearing *en banc*, would vote against rehearing rather than voting for it; and that the Court of Appeals, faced with the issue for the first time, would decide that recused judges should not be counted in determining whether a "majority" of the court had voted for rehearing *en banc*.

2. Petitioners suggest that the "potential for manipulative abuse" of *en banc* procedures can be discouraged by a ruling that recused judges must be counted when the court of appeals determines whether a majority has voted for rehearing. Pet. Supp. 3, 4. The fallacies of this position are clear. First, petitioners unrealistically assume that counsel can determine in advance how a judge will vote on a suggestion for rehearing and can make the associations necessary to recuse that judge. Second, the hypothetical evil that petitioners conjure up would remain if recused judges are counted for purposes of determining whether a "majority" has voted to rehear. Under petitioners' proposed rule, if one judge recused himself in a circuit having ten judges, the party seeking rehearing *en banc* would need to muster two-thirds of the votes cast—*i.e.*, six out of nine votes. In that event, the party opposing rehearing would have an incentive to reduce the chances of rehearing *en banc* by making an association that would recuse one of the ten judges. Thus, the "potential for abuse" divined by petitioners is

irrelevant to any possible construction of 28 U.S.C. § 46(c).

Respectfully submitted,

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